

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

CRL.A.No. 1188 of 2002()

SC.246/2002 ON THE FILE OF THE COURT OF THE ADDL. DISTRICT AND SESSIONS
JUDGE (ADHOC-I), THODUPUZHA
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APPELLANT: ACCUSED:

VARGHESE @ THANKACHAN, S/O. MATHEW,
THALAYIKKATTU HOUSE, KAMPIPALAM KARA, PANOOR,
KARIMANNOOR VILLAGE.

BY ADV. SRI.ELVIN PETER P.J.

RESPONDENT:COMPLAINANT:

STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 21-8-2007 , THE COURT ON 21/08/2007 DELIVERED THE
FOLLOWING:

CrI.M.A.No. 9087/2002 in CrI.A.No. 1188/2002

Dismissed.

21st August, 2007

Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

Crl.L.P.No. /2006

Judgment
-12-2006

K.Thankappan, J.

Crl. A. No. 1188 of 2002

Dated this the 21st day of August, 2007

JUDMENT

Accused in S.C.No.246/2000 on the file of the Court of the Additonal District and Sessions Judge (Adhoc-I), Thodupuzha is the appellant. He was found guilty under section 55(a) of the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for one month. The above conviction and sentence awarded against the appellant are assailed in this appeal.

2. The learned counsel for the appellant submits that the evidence of PWs.1, 4 and 5 ought not have been accepted by the trial court as their evidence has not been corroborated by any independent evidence. The learned counsel also submits that the provisions of the Abkari Act and the Kerala Excise Manual have not been complied with by PW1 while detecting the offence and hence the findings entered against the appellant

may be quashed. The learned counsel further submits that the trial court ought to have found that there was delay in producing the sample and residue before the court and there is no evidence to show that the sample and residue were kept in the proper custody till they were produced before the court and hence as per a decision of this Court reported in Narayani V. Excise Inspector (2002(3) KLT 725) chance of tampering cannot be ruled out.

3. The prosecution case against the appellant was that he was found in possession of four 375 ml. capacity of bottles of arrack. PWs.1 to 5 were examined on the side of the prosecution. PWs.2 and 3 independent witnesses were declared hostile to the prosecution. Pws1, 4 and 5 were very vehemently cross-examined on behalf of the appellant, nothing was brought out to shake their evidence. The trial court after considering the entire evidence found that there was no ground to disbelieve the evidence of PWs.1, 4 and 5.

4. Regarding the second contention, as per rule 34 of the Kerala Excise Manual, seizure should be reported to the court forthwith and request made for sending a sample for analysis, which reads as follows:-

“34. Contraband articles seized such as wash which may be, or are likely to become, so offensive as to be a nuisance need not be sent to the Range Office for safe

custody. But if in any case an officer judges their retention to be necessary for production in court or for any other reasons, he must bury them or make such other arrangements for their safe custody as will not cause a nuisance. Generally speaking, such articles may safely be destroyed at once in the presence of the accused and the Inspector after taking samples of them. The accused may also be required to affix his seal to the samples. Three samples of not less than (1) 130 grams weights from each distinct kind of excisable drug and (2) two samples of such smaller quantity as may be available of each kind of liquor or wash, may be taken in the presence of the Excise Inspector or senior most Excise Officer present and the accused. Each set of these samples should then be sealed and marked with the same number or mark the particulars of which should be entered in the appropriate columns of the contraband register and in the occurrence report of the case. One sample of each set may be taken by the officer depositing it and two may be left with the officer in charge of the Range with the occurrence report of the case. If the articles are deposited by the Inspector or a member of the Range staff, all the 3 may be retained in the Range Office. One of these samples will then be available for the use of the officer in charge of the Range for analysis, if need be and the other for the Magistrate's inspection, if the case is prosecuted before a Magistrate.”

Section 53 of the Abkari Act stipulates that all officers in charge of police station shall take charge of and keep in safe custody all articles seized under the the Abkari Act and allow any abkari officer to affix his seal to the articles and to take samples of and from them and all samples taken shall also be sealed with the seal of the officer in charge of the police station. Apart from the above, as per the provisions of the Kerala Chemico-Legal Examination Rules 1959, sample should have been sent for opinion of the

Chemical Examiner and the Chemical Examiner shall, as far as practicable, furnish a quantitative analysis stating the result of the analysis which led to the conclusion in his report under section 293 of Cr.P.C. Rules 2 and 3 of the relevant rules read as follows:-

2.

(a) In the transmission of articles to the Chemical Examiner to Government for analysis, three objects are to be mainly kept in view viz., the proof of identity, the impossibility of any interference during transit, and the preservation of the articles from decomposition.

(b) The Chemical Examiner shall bring to the notice of Government every case in which these Rules are not strictly adhered to.

3. In every case in which analysis is required for judicial purposes by the Police, Magistracy, or Excise Officers, the Chemical Examiner shall as far as practicable, furnish a quantitative analysis stating the results of the analysis which led to the conclusion in his report under section 293 of the code of criminal Procedure, 1973 the report being legal and a very clinching piece of evidence in any investigation, inquiry, trial or other proceedings under the Code.

From the evidence now adduced would show that no sample was taken from the contraband article. In cross-examination PW1 stated that “തൊണ്ടി ആയി സീൽ ചെയ്തതിനാൽ ഞാൻ സാമ്പിളെടുത്തില്ല. He further stated that “4 കുപ്പികളിലും സീൽവച്ചു. കുപ്പികളിൽ സീൽ ഇല്ലായിരുന്നു. ഇപ്പോൾ കുപ്പികളിൽ

നിറയെ ചാരായമില്ല. അതു സാമ്പിൾ കെമിക്കൽ പരിശോധന കയച്ചതിനാലാണ്. ഇപ്പോൾ കുപ്പികൾ ഞാൻ സാമ്പിൾ ചെയ്തവസ്ഥയിലില്ല. അത് സാമ്പിളെടുക്കാൻ പൊട്ടിച്ചതിനാലാണ്. In cross-examination PW4 stated that “ കുപ്പികൾ സീൽചെയ്തവയായിരുന്നില്ല”. In the above circumstances, the evidence of PWs.1 and 4 cannot be relied on to prove the prosecution case. Hence, the sample was not taken for analysis. It has come out in evidence that the offence was detected on 8-12-1998 and the sample and residue were produced before the court on 5-4-1999. There was inordinate delay in producing the same before the court. With regard to the delay in producing the sample and residue before the court and no explanation was offered by PW1 and P4 regarding the delay. In a decision reported in Narayani V. Excise Inspector (2002(3) KLT 725, this Court held that in the absence of any evidence to prove that residue and sample were kept in the proper custody till the date of producing the same before the court, the chance of tampering with the sample taken and the residue seized could not be ruled out. Though PW1 has stated that the seized contraband article was entrusted to the officer, there is no evidence to show that the sample and residue were kept in the proper custody till the same was produced before the court. In this context evidence of PW5 Excise Inspector is relevant. In

cross examination when a question, “കോടതിയിൽ 5-4-99 ൽ കിട്ടിയതായി കാണുന്നതിനെപ്പറ്റി എന്തെങ്കിലും പറയാനുണ്ടോ” was put to him, he answered negative and further stated that “ഗാർഡുമാർ കോടതിയിൽ എത്തിച്ചു. ഗാർഡിനെ പിറ്റേദിവസം ഏല്പിച്ചു. ഗാർഡു തോമസാണ്. ടിയാൻ കോടതിയിൽ ഏല്പിച്ചു. ടിയാൻ സാക്ഷിയല്ല. കുപ്പികൾ തൊണ്ടിമുറിയിൽ സൂക്ഷിച്ചു. That apart, there is no evidence to show that the sample and residue were kept in the proper custody till they were produced before the court. In the above circumstances, this Court is of the view that the prosecution has not proved that residue and sample were kept in the proper custody till those were produced in court and chance of tampering cannot be ruled out and hence benefit of doubt is to be given to the appellant. Hence, the contention that the officers have not complied with the provisions of the Abkari Act and the Kerala Excise Manual is sustainable. Taking into consideration all the facts and circumstances of the case, this Court is of the view that the prosecution has failed to prove the case against the petitioner beyond reasonable doubt. Therefore, the findings of the trial court and the appellate court are liable to be set aside.

8. Hence, the judgment under appeal is set aside and the appellant is acquitted. Bail bond executed by the appellant shall stand cancelled. It is

made clear that if any amount is deposited by the appellant as fine that shall be refunded to him as per law.

The appeal is allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

Crl.A. No.1188/2002

Judgment
21-8-2007